

1 PATRICK D. ROBBINS (CABN 152288)
2 Acting United States Attorney
3 PAMELA T. JOHANN (CABN 145558)
4 Chief, Civil Division
5 KELSEY J. HELLAND (CABN 298888)
6 Assistant United States Attorney
7 U.S. ATTORNEY'S OFFICE
8 450 Golden Gate Avenue, Box 36055
9 San Francisco, California 94102-3495

10 ERIC HAMILTON
11 Deputy Assistant Attorney General
12 DIANE KELLEHER
13 Branch Director
14 CHRISTOPHER HALL
15 Assistant Branch Director
16 JAMES D. TODD, JR.
17 Senior Trial Counsel
18 YURI S. FUCHS
19 GREGORY CONNER
20 Trial Attorneys
21 U.S. DEPARTMENT OF JUSTICE
22 Civil Division, Federal Programs Branch
23 P.O. Box 883
24 Washington, DC 20044
25 *Counsel for Defendants*

**UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF CALIFORNIA
SAN FRANCISCO DIVISION**

AMERICAN FEDERATION OF
GOVERNMENT EMPLOYEES, *et al.*

Plaintiffs,

V.

UNITED STATES OFFICE OF PERSONNEL
MANAGEMENT, *et al.*,

Defendants.

Case No. 3:25-cv-1780-WHA

**DEFENDANTS' RESPONSE TO MARCH
28, 2025, ORDER SETTING FURTHER
BRIEFING SCHEDULE**

The Hon. William H. Alsup

INTRODUCTION

Defendants submit the following pursuant to this Court’s March 28, 2025, Order directing the parties to “brief the extent to which aspects of this action must be adjudicated on an ‘administrative record,’ if any, and the extent to which other aspects of this action must be adjudicated on a trial or summary judgment record with the benefit of formal discovery.” Order Granting in Part & Denying in Part Defs.’ Mot. for a Protective Order & Setting Further Br. Sched., ECF No. 164. For the reasons set forth below, this Court should, respectfully, reverse its prior ruling allowing discovery and should instead direct the parties to negotiate a schedule for Defendants to file the certified administrative record and then file cross-motions for summary judgment.

BACKGROUND

Plaintiffs' Second Amended Complaint challenges guidance issued by the U.S. Office of Personnel Management ("OPM") concerning the termination of probationary employees and brings five claims for relief against twenty-two Executive Branch agency defendants. *See generally* Second Am. Compl., ECF No. 90 ("SAC"). Plaintiffs' five causes of action arise under the Administrative Procedure Act ("APA"), 5 U.S.C. § 701 *et seq.*; they bring four claims alleging violations of the APA and one alleging a constitutional violation of the separation of powers. *See* SAC ¶¶ 190–229 (Claims I — V). Plaintiffs' separation-of-powers claim alleges that OPM's guidance "exceed[s] any statutory authority granted to it by Congress," *id.* ¶ 199, and is therefore "*ultra vires*." *Id.* ¶¶ 191, 201.

On February 27, 2025, this Court entered a temporary restraining order (“TRO”) holding OPM’s guidance “unlawful[and] invalid,” and ordered that the guidance “must be stopped and rescinded.” *Am. Fed’n Gov’t Emps. v. U.S. Off. of Pers. Mgmt.*, No. 3:25-cv-1780, 2025 WL 660053, *6-*7 (N.D. Cal. Feb. 28, 2025) (“*AFGE v. OPM*”). Days later, OPM revised its earlier guidance to clarify that “OPM is not directing agencies to take any specific performance-based actions regarding probationary employees.” Mem. from Charles Ezell, Acting Director, OPM, to Heads and Acting Heads of Departments and Agencies at 2 (Revised March 4, 2025), ECF No. 78 (“Revised OPM Guidance”). OPM’s revised guidance emphasized that “[a]gencies have

1 ultimate decision-making authority over, and responsibility for, such personnel actions.” *Id.*

2 On March 13, 2025, this Court awarded a preliminary injunction to the organizational
 3 Plaintiffs that extended the relief provided in its TRO and ordered the Departments of
 4 Agriculture, Defense, Energy, the Interior, the Treasury, and Veterans Affairs to cease
 5 terminating probationary employees based on OPM’s initial guidance and to reinstate
 6 probationary employees terminated as a result of OPM’s initial guidance. *See* Tr. of Mar. 13,
 7 2025, Hrg. at 52:6 – 53:25, ECF No. 120; Mem. at 14, ECF No. 132. The Court also authorized
 8 discovery. *See* Tr. of March 13, 2025, Hrg. at 54:10-19.

9 ARGUMENT

10 This case is brought under the APA and challenges final agency action taken by OPM.
 11 Like nearly all APA cases, including those that allege constitutional violations, it should be
 12 decided on the administrative record of documents that OPM considered in taking the agency
 13 action that Plaintiffs challenge. As a result, this Court should reconsider its order authorizing
 14 discovery and should instead direct the parties to negotiate a schedule providing for Defendants
 15 to assemble and file the certified administrative record and then for the parties to file cross
 16 motions for summary judgment. Discovery should be allowed only if Plaintiffs demonstrate the
 17 record is incomplete and the Court finds that it cannot discern the basis for OPM’s decision.
 18 Even then, trial *de novo* is inappropriate.

19 First, “a court reviewing agency action under the APA must limit its review to the
 20 administrative record.” *San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 992 (9th
 21 Cir. 2014) (citing *Camp v. Pitts*, 411 U.S. 138, 142 (1973)); *see also Dep’t of Com. v. New York*,
 22 588 U.S. 752, 780 (2019) (“[I]n reviewing agency action, a court is ordinarily limited to
 23 evaluating the agency’s contemporaneous explanation in light of the existing administrative
 24 record.”). “That principle reflects the recognition that further judicial inquiry into ‘executive
 25 motivation’ represents ‘a substantial intrusion’ into the workings of another branch of
 26 Government and should normally be avoided.” *Dep’t of Com.*, 588 U.S. at 780–81 (quoting *Vill.*
 27 *of Arlington Heights v. Metro. Hous. Devel. Corp.*, 429 U.S. 252, 268, n.18 (1977)). Judicial
 28 review based on the administrative record remains the rule even if a plaintiff brings *ultra vires* or

1 other constitutional claims. *See FCC v. ITT World Commc 'ns, Inc.*, 466 U.S. 463, 469 (1984)
 2 (appellate court may “fairly … evaluate” a claim of *ultra vires* agency action on direct review
 3 under the APA); *see also, e.g., Bellion Spirits, LLC v. United States*, 335 F.Supp.3d 32, 43
 4 (D.D.C. 2018); *Arnott v. U.S. Citizenship & Immigr. Servs.*, No. 10-cv-1423, 2012 WL 8609607,
 5 at *1 (C.D. Cal. Oct. 10, 2012); *Air Brake Sys., Inc. v. Mineta*, 202 F. Supp. 2d 705, 710 (E.D.
 6 Mich. 2002), *aff'd*, 357 F.3d 632 (6th Cir. 2004).

7 Indeed, when a plaintiff invokes both the APA and *ultra vires* causes of action, a court
 8 should first consider the plaintiff’s APA claim, *see Chamber of Com. v. Reich*, 74 F.3d 1322,
 9 1326–27 (D.C. Cir. 1996), and reach the constitutional question only if necessary, *see, e.g.*,
 10 *Regents of U. of Cal. v. Bakke*, 438 U.S. 265, 380 (1978). Even then, the court’s review should
 11 be confined to the administrative record, otherwise “[t]he APA’s restriction of judicial review to
 12 the administrative record would be meaningless if any party seeking review based on ...
 13 constitutional deficiencies was entitled to broad-ranging discovery.” *Harvard Pilgrim Health*
 14 *Care v. Thompson*, 318 F. Supp. 2d 1, 10 (D.R.I. 2004).

15 Second, the Ninth Circuit has expressly held that a district court may look beyond the
 16 administrative record and consider extra-record evidence only: (1) if admission of additional
 17 evidence is necessary to determine whether the agency has considered all relevant factors and
 18 has explained its decision, (2) if the agency has relied on documents not in the record, (3) when
 19 supplementing the record is necessary to explain technical terms or complex subject matter, or
 20 (4) when plaintiffs make a showing of agency bad faith.” *Lands Council v. Powell*, 395 F.3d
 21 1019, 1030 (9th Cir. 2005) (internal quotations and citations omitted); *see also ITT World*
 22 *Commc 'ns*, 466 U.S. at 469 (if the court “finds that the administrative record is inadequate, it
 23 may remand to the agency” for further proceedings).¹ “These exceptions apply only under

24
 25 ¹ With respect to the Ninth Circuit’s fourth criteria, a court may review of extra-record
 26 evidence based on bad faith only after a plaintiff makes “strong showing” of bad faith. *Dep't of*
27 Com. 588 U.S. at 781 (quoting *Citizens to Preserve Overton Park, Inc. v. Volpe*, 401 U.S. 402,
 420 (1971)). And “like other official agency actions, an agency’s statement of what is in the
 28 record is subject to a presumption of regularity.” *Blue Mountains Biodiversity Project v. Jeffries*,
 99 F.4th 438, 445 (9th Cir. 2024) (quoting *Goffney v. Becerra*, 995 F.3d 737, 748 (9th Cir.
 2021)).

1 extraordinary circumstances, and are not to be casually invoked unless the party seeking to
 2 depart from the record can make a strong showing that the specific extra-record material falls
 3 within one of the limited exceptions.” *Voyageurs Nat. Park Ass’n v. Norton*, 381 F.3d 759, 766
 4 (8th Cir. 2004). As a result, judicial review of extra-record evidence is permitted only where a
 5 court “require[s] supplementation of the administrative record if it is incomplete” and where
 6 “necessary to plug holes in the administrative record.” *Wilson v. Comm’r of Internal Revenue*,
 7 705 F.3d 980, 991 (9th Cir. 2013) (quotations omitted); *see also Lands Council*, 395 F.3d at
 8 1030 (“Though widely accepted, these exceptions are narrowly construed and applied.”). The
 9 party seeking to admit extra-record evidence bears the burden of demonstrating that a relevant
 10 exception applies. *See San Luis & Delta-Mendota Water Auth. v. Locke*, 776 F.3d 971, 993 (9th
 11 Cir. 2014).

12 Third, even if this Court allows discovery, the APA does not allow for trial *de novo*. The
 13 APA permits trial *de novo* in limited circumstances that are not present here. Although the APA
 14 permits a court to “hold unlawful and set aside agency action, findings, and conclusions found to
 15 be … unwarranted by the facts to the extent that the facts are subject to trial de novo by the
 16 reviewing court,” 5 U.S.C. § 706(2)(F), trial is only available: “(1) ‘when the action is
 17 adjudicatory in nature and the agency factfinding procedures are inadequate,’ and (2) ‘when
 18 issues that were not before the agency are raised in a proceeding to enforce nonadjudicatory
 19 agency action.’” *NVE, Inc. v. U.S. Dep’t of Health & Hum. Servs.*, 436 F.3d 182, 189 (3d Cir.
 20 2006) (quoting *Overton Park*, 401 U.S. at 415); *Acumenics Rsch. & Tech. v. U.S. Dep’t of*
 21 *Justice*, 843 F.2d 800, 804 (4th Cir. 1988).

22 In this case, discovery is not appropriate because the Court should review Plaintiffs’
 23 claims based on the administrative record of OPM’s decisionmaking that produced the
 24 challenged guidance. Defendants have not yet gathered, prepared, and certified the
 25 administrative record of OPM’s decisionmaking. And Plaintiffs have made no showing that the
 26 record is inadequate based on any or the relevant factors articulated by the Ninth Circuit. *See*
 27 *Lands Council*, 395 F.3d 1019, 1030. Nor could they, since OPM has not yet even produced the
 28 record. Even then, if the Court “finds that the administrative record is inadequate, it may remand

1 to the agency” for further proceedings in lieu of allowing supplementation of the record, *see ITT*
 2 *World Commc ’ns*, 466 U.S. at 469, rather than permit discovery.

3 Nor is trial *de novo* under the APA available here: Plaintiffs challenge allegedly improper
 4 rulemaking, not agency adjudication. *See NVE*, 436 F.3d at 189; *Acumenics Rsch. & Tech.*, 843
 5 F.2d at 804. Nor could a claimed dispute of fact be used to justify trial in an APA matter. *See*
 6 *California v. U.S. Dep’t of Lab.*, 306 F. Supp. 3d 1180, 1184 (E.D. Cal. 2018) (“When a plaintiff
 7 challenges a federal agency’s actions under the APA, the district court does not identify and
 8 resolve factual disputes; the court instead determines whether the administrative record
 9 supported the agency’s decision as a matter of law.”); *Coburn v. McHugh*, 77 F. Supp. 3d 24, 29
 10 (D.D.C. 2014) (“When reviewing the decision of an administrative body pursuant to the APA,
 11 the reviewing court generally will not resolve factual disputes, but instead reviews the decision
 12 as an appellate court addressing issues of law.”), *aff’d sub nom. Coburn v. Murphy*, 827 F.3d
 13 1122 (D.C. Cir. 2016). Rather, because of APA administrative record review, “claims brought
 14 under the APA are adjudicated without a trial or discovery.” *Audubon Naturalist Soc’y of the*
 15 *Cent. Atl. States, Inc. v. U.S. Dep’t of Transp.*, 524 F. Supp. 2d 642, 660 (D. Md. 2007); *see also*
 16 *Silver Dollar Grazing Ass’n v. United States Fish & Wildlife Serv.*, No. 06-cv-02, 2007 WL
 17 9710133, at *1 (D. Mont. June 1, 2007) (“Actions under the APA are well-suited for summary
 18 judgment because such actions permit the Court only to review the agency’s administrative
 19 record—there is effectively no factual dispute.”). Thus, trial *de novo* is not available here.

20 Finally, discovery is not appropriate, and trial *de novo* is not available, because any claim
 21 of constitutional violation on the part of OPM is now moot. Although this Court initially held
 22 that OPM’s actions were *ultra vires*, *AFGE v. OPM*, 2025 WL 660053, at *4-*5, OPM has
 23 issued revised guidance clarifying that “[a]gencies have ultimate decision-making authority
 24 over, and responsibility for, such personnel actions.” Revised OPM Guidance at 1. Thus,
 25 whatever basis existed for allowing discovery into OPM’s alleged constitutional violation is no
 26 longer a live controversy. Given that Plaintiffs seek forward-looking injunctive relief, allowing
 27 discovery is not appropriate now.

28 Defendants therefore respectfully submit that this Court should reverse its prior order

1 allowing discovery to commence. *See* Tr. of March 13, 2025, Hrg. at 54:10-19. The Court should
 2 instead direct the parties to negotiate a briefing schedule by which Defendants will file the
 3 certified administrative record and the parties will agree on a summary judgment briefing
 4 schedule. If, after review of the administrative record, Plaintiffs believe that the record is
 5 insufficient, Plaintiffs may file a motion seeking review of extra-record evidence necessary to
 6 supplement any identified gaps in the record as well as limited discovery necessary to obtain
 7 such extra-record evidence.

8 Defendants' proposed course of action is "the traditional civil litigation sequence" for an
 9 APA case, and discovery is not the norm. In an APA case, "the plaintiff files a complaint; then
 10 the defendant answers or seeks dismissal of the complaint; then ... the Government produces an
 11 administrative record; and only then does the Court consider motions for summary judgment."
 12 *G.Y.J.P. by & through M.R.P.S. v. Wolf*, No. 1:20-cv-1511, 2020 WL 4192490, at *2 (D.D.C.
 13 July 21, 2020); *Ctr. for Bio. Diversity v. Kempthorne*, No. 4:08-cv-1339, 2008 WL 3822948, at
 14 *4 (N.D. Cal. Aug. 13, 2008) (adopting a similar schedule in the court's case management
 15 order). "Normally, APA cases are resolved on cross-motions for summary judgment, frequently
 16 with the defendant filing an opening brief, the plaintiff filing a single brief encompassing its
 17 opposition and cross-motion, followed by a reply from the defendant, and concluding with a
 18 reply from the plaintiff." *Pinnacle Armor, Inc. v. United States*, 923 F. Supp. 2d 1226, 1245
 19 (E.D. Cal. 2013).

20 CONCLUSION

21 This Court should reverse its prior ruling allowing discovery to commence and should
 22 instead direct the parties to negotiate a briefing schedule providing for Defendants to file the
 23 certified administrative record and for the parties to file cross motions for summary judgment.
 24
 25
 26
 27
 28

Dated: April 1, 2025

Respectfully submitted,

PATRICK D. ROBBINS (CABN 152288)
Acting United States Attorney
PAMELA T. JOHANN (CABN 145558)
Chief, Civil Division
KELSEY J. HELLAND (CABN 298888)
Assistant United States Attorney
U.S. ATTORNEY'S OFFICE
450 Golden Gate Avenue, Box 36055
San Francisco, California 94102-3495

ERIC HAMILTON
Deputy Assistant Attorney General

DIANE KELLEHER
Branch Director
CHRISTOPHER HALL
Assistant Branch Director

s/ James D. Todd, Jr.
JAMES D. TODD, JR.
Senior Trial Counsel
YURI S. FUCHS
GREGORY CONNER
Trial Attorneys
U.S. DEPARTMENT OF JUSTICE
Civil Division, Federal Programs Branch
P.O. Box 883
Washington, DC 20044
Counsel for Defendants